

**Bills Committee on  
Employment (Amendment) Bill 2006**

**Administration's Response to Issues Raised  
at the Bills Committee Meeting Held on 1 February 2007**

**Introduction**

This paper sets out the Administration's response to views expressed by Members of the Bills Committee at the Bills Committee meeting held on 1 February 2007.

**Using different modes of calculation for employees with fixed wages and variable wages**

2. While welcoming the proposed mode of calculation of statutory entitlements under the Bill for employees with variable wages, a Member opined that the use of a 12-month moving average might unnecessarily complicate the calculation of statutory entitlements for employees with fixed wages. He requested the Administration to consider using the last month's wages of an employee instead of a 12-month moving average for the latter category of employees.

3. We wish to point out that the adoption of a longer reference period in the Bill for calculating statutory entitlements is to address the concerns raised by both employers and employees. Indeed, the relative merits of using an employee's last month's wages or a 12-month moving average were thoroughly deliberated by the Labour Advisory Board (LAB). The LAB's consensus is that the adoption of the latter mode of calculation, irrespective of whether the employee is remunerated on a daily, monthly or piece-rate basis, would provide a more stable, predictable and equitable basis for the calculation of statutory entitlements for employees.

4. According to the advice of the Department of Justice (DoJ), it would be very difficult to define the term "fixed wages" when wages consist of different items under the Employment Ordinance (EO) and, depending on one's terms of employment, may vary and hence not fixed. Apart from legal considerations, differential treatment for employees with fixed wages and those with variable wages would not be desirable from the labour relations perspective as it may create unnecessary disputes between employers and employees as to whether the latter's wages are fixed or variable. Given the evolving and increasingly complex nature of the remuneration systems in

Hong Kong, and in light of the Court of Final Appeal (CFA)'s ruling in the Lisbeth case, we consider it imperative that the law should provide a workable, predictable and consistent mode of calculation for statutory entitlements. This is why we have proposed in the Bill a workable mode of calculating statutory entitlements by reference to the average of the wages earned in the past 12 months for all categories of employees.

5. We would also like to point out that with the keeping of proper wage and leave records which is a good human resources management practice, the adoption of a moving 12-month average should not create much additional administrative work as the relevant records for the first 11 months should already be available.

6. For the above reasons, we consider it appropriate to adopt in the Bill the same modes of calculation of statutory entitlements for different categories of employees.

### **Proposal of setting a wage ceiling for calculating statutory entitlements**

7. Some Members suggested that, while the Bills Committee's scrutiny of the Bill was in progress, the Administration should, in parallel, refer the proposal of setting a wage ceiling on commission for calculating statutory entitlements to the LAB for deliberation.

8. The proposal of introducing a wage ceiling for calculating statutory entitlements involves highly complex and controversial issues including, among others, the component(s) of wages to be capped and the level of ceiling to be imposed. These would have far-reaching implications on employees' benefits. As such, the proposal would need to be thoroughly examined and deliberated outside the context of the current amendment exercise. Nevertheless, the Administration undertakes to consult the LAB on the proposal at an appropriate time.

### **Rationale for not including other statutory entitlements under the EO such as severance payment and long service payment in the Bill**

9. It is important to note that the proposed amendments embodied in the Bill have arisen from the afore-mentioned CFA ruling which has excluded commission from the calculation of holiday pay and annual leave pay for certain employees and that the Bill seeks to ensure that a workable mode of calculation is available for the calculation of such statutory benefits. In other words, the Bill is intended to plug a legal loophole identified by the CFA ruling.

10. The reason why maternity leave pay, sickness allowance, wages in lieu of notice and end of year payment are also covered in the Bill is that according to DoJ's advice, these four items have a construction similar to that of holiday pay and annual leave pay and may thus be caught by the CFA ruling. On the other hand, severance payment and long service payment do not have a construction similar to that of holiday pay and annual leave pay and there is therefore no need to include them in the Bill.

### **Modes of calculating severance payment and terminal payments for unreasonable dismissal**

11. Under the EO, severance payment shall be calculated on the basis of two-thirds of the last month's wages of a monthly-rated employee or in other cases, 18 days' wages chosen by an employee out of his last 30 normal working days for every year of his reckonable years of service, subject to the maximum amount stipulated in the Ordinance. An employee may also elect to use his wages averaged over the last 12 months for the calculation.

12. As regards terminal payments for unreasonable dismissal, the same mode of calculation applies, except that the employee may be eligible for such payments even if he has not attained the qualifying length of service required for the entitlement. In such case, the terminal payment shall be calculated according to his actual length of service.

13. For the purpose of consistency, a Member questioned why the mode of calculation for severance payment was not adopted for calculating the various statutory entitlements under the Bill.

14. Unlike other statutory entitlements such as holiday pay and annual leave pay, severance payment is payable to an employee upon dismissal by reason of redundancy. As explained above, the employee is given an option to use either his last month's wages or the average wages in the last 12 months for the calculation of severance payment. This provision is designed to protect employees whose wages would normally have been depressed due to slack business or not being provided with sufficient work prior to being made redundant. Thus, given the special nature of severance payment, direct comparison with the six statutory entitlements covered in the Bill is not appropriate.